

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-7608

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-7608

In the Matter of

The Complaint of TUG HELEN B. MORAN, INC., as owner,
and MORAN TOWING & TRANSPORTATION CO., INC., as
chartered owner, of the Tug DIANA L. MORAN for exon-
eration from or limitation of liability,

Plaintiffs,

MORAN TOWING & TRANSPORTATION CO., INC.,

Plaintiff-Appellant,

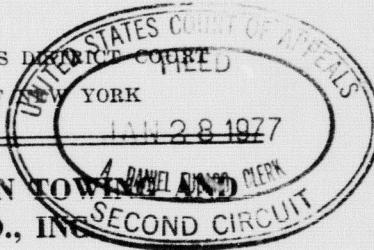
STATE OF CONNECTICUT,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

10/28/1977

**BRIEF FOR APPELLANT MORAN TOWING AND
TRANSPORTATION CO., INC.**



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**BRIEF FOR APPELLANT MORAN TOWING AND
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Issues Presented for Review

1. Where the Tomlinson Bridge was not elevated to the angle required by its permit, so that its leaves improperly extended over the navigable channel, did the District Court err in failing to hold this fault a contributing cause of

the collision between the barge and one of the overhanging leaves.

2. Where the Tomlinson Bridge's fender system was broken and deteriorated, did the District Court err in failing to hold this fault a contributing cause of the collision between the barge and one of the overhanging leaves.

Statement of the Case

On May 17, 1972 tug DIANA MORAN was outbound from New Haven with barge BECRAFT in tow astern of the tug, assisted by tug DEVON at the after end of the flotilla. While passing through the Tomlinson Bridge, the side of the barge struck the unprotected stone abutment (damaging the barge), and thereafter a deck chock on the barge snagged a girder on the overhanging leaf (damaging the bridge and barge).

Tug Helen B. Moran, Inc. as owner, and Moran Towing & Transportation Co., Inc., as chartered owner, of tug DIANA L. MORAN, filed a complaint for exoneration from or limitation of liability and claims were filed in that proceeding by the State of Connecticut (bridge owner), Atlantic Cement Company, Inc.* (barge owner) and Tug Devon, Inc. (owner of the DEVON). Tug Devon, Inc. filed a complaint for exoneration from or limitation of its liability and claims were filed against it by the State, Atlantic, and both Moran companies. The two limitation proceedings were consolidated for all purposes. Judge Lasker (at 420 F. Supp. 1282) held:

* Atlantic's claim was settled before trial by Moran pursuant to stipulation of all parties.

- (1) Moran Towing & Transportation Co., Inc. (hereinafter "Moran") and the State equally liable for the damage from the abutment collision;
- (2) Moran solely liable for the damage from the girder collision;
- (3) reserved the issue of Moran's limitation of liability until damages were determined;
- (4) dismissed the claims against Tug Helen B. Moran, Inc., and
- (5) exonerated the DEVON, severing and discontinuing her limitation proceeding.

Moran appeals from so much of the judgment as absolved the State from liability for the girder collision.

Statement of the Facts

On the afternoon of May 17, 1972, tug DIANA L. MORAN took the barge BECRAFT in tow at the Atlantic Cement Company dock in the Mill River at New Haven, Connecticut bound for RAVENA, New York (26a).* The 290' long x 55' wide unmanned barge was light, with drafts of about 2'06" forward and 4' aft (26a). The DIANA was towing the barge stern first on two gate hawsers with the stern of the tug about 15'-20' from the stern of the barge (27a-28a). Tug DEVON was made fast at the other end of the barge by two lines (28a). The pilot house of each tug was below the deck level of the barge (28a, 47a). The captain of the DIANA was aboard the barge as pilot, in charge of the navigation of the flotilla and was in communication with the tugs through his walkie-talkie set (29a).

* Suffix "a" designates reference to Joint Appendix.

The flotilla left the dock and proceeded uneventfully through a swing bridge at Chapel Street, being pulled by the DIANA at 50 rpm or slow speed ahead (30a, 47a-48a). The flotilla then headed down the Mill River towards the junction of the Mill and Quinnipiac Rivers, where it was necessary to make a turn of about 90° to the right to proceed into the Quinnipiac River and head for the Tomlinson Bridge (30a-31a, 48a).

The right turn was assisted by backing the DEVON and, when the forward end of the barge was about 400' from the Tomlinson draw, the DEVON was stopped (31a-32a). With the DIANA still at slow ahead the flotilla, then almost at a standstill, regained speed and continued forward at about 1½-2 knots over the ground against the end of the flood current (32a-33a, 48a, 29a), shaping up for the open draw of the Tomlinson Bridge ahead.

The bridge, a bascule type, has two leaves which open in the middle but, when elevated, the leaves partially overhang the 126' wide navigable channel that runs through the draw (30a-31a).

With the DIANA pulling at slow speed the barge entered the draw, slightly favoring the east or left side to insure that a king post on the starboard* side of the barge would clear the leaf hanging over the right side of the draw (32a-33a). The king post is shown on the photograph Exh. 47 (E-15).** The pilot was standing on the starboard side of the barge about midships to better view the king post and its clearance (33a) under the leaves which he estimated were raised to about a 65° angle (31a).

* Referenced to the barge as being towed stern first.

** E designates reference in Joint Exhibit volume.

When about one-third of the barge was in the draw the pilot observed that the after end of the barge was sliding too far to the left so that the barge was transiting the draw on a slant to the axis of the channel (34a). The left side of the barge, about midships, then struck the granite abutment of the bridge (34a), which should have been protected by wooden fenders but was not. This contact damaged the hull of the barge at the water line (75a-76a). The unprotected abutment is shown in the photograph Exh. 12 (34a-35a, 40a-41a, 51a; E-3).

The barge then deflected or bounced to the right off the abutment and further out into the channel (35a, 44a). On noticing this motion, the DIANA's mate increased speed to straighten the tow (48a-50a) but (the Court found—Op. 104a) this increase caused the barge's after end to move left i.e., further under the bridge leaf on that side. As the barge continued through the draw, a steel chock 4' high and 7' long, mounted on the deck of the barge near the after left side, snagged a girder on the overhanging left side leaf, causing damage to the bridge and barge (36a-37a). Only the upper 6" of the chock engaged the girder (39a, 50a). If the barge had been 3" further to the right in the channel, the chock would have passed safely under the girder (85a-86a; Exh. 54 Trigonometric sketch, E-19). The type of chock that hit is shown in the photograph Exh. 48 (E-16) and the actual chock (damaged area cut away) is shown in the photograph Exh. 49 (E-17).

The plans approved by the Army Engineers for construction of the bridge specified the expected width of water between the abutments as 126' and required that no part of the elevated leaves were to overhang the water

(80a-82a). To meet this requirement, the leaves had to elevate to an angle of 82° above horizontal (82a; Exh. 13, E-4). In fact, however, the bridge could not achieve this angle and for years had raised to only 65-7° (72a; Exh. 13, E-4). When elevated to 65-7°, the leaves extended 19' over the water on each side (82a-84a; Exh. 35 Sketch, E-11). It is beyond dispute that *but for* this overhang, the chock could not have snagged the girder.

The Decision Below

Although the District Court found that the bridge's inability to elevate to 82° violated Section 9 of the Rivers and Harbors Act [33 U.S.C. §401], the Court concluded that there was no causation between this statutory violation and the chock snagging the leaf (Op. 106a-109a).

Although the District Court found that the missing fenders violated Section 9 of the Rivers and Harbors Act [33 U.S.C. §401] (Op. 106a), the Court concluded that the missing fenders did not contribute to the chock snagging the leaf (Op. 100a-101a).

Moran challenges these conclusions on this appeal.

POINT I

Where the Tomlinson Bridge was not elevated to the angle required by its permit, so that its leaves improperly extended over the navigable channel, the District Court erred in failing to hold this fault a contributing cause of the collision between the barge and one of the overhanging leaves.

The District Court found:

"The Tomlinson Bridge was built pursuant to a permit granted in 1922 by the United States Army Corps of Engineers, as required by the Rivers and Harbors Act of 1899 (33 U.S.C. §401). The bridge was completed in 1925.

The approved plans specified the expected width of the water between the bridge abutments to be 126 feet and required that no part of the leaves when elevated extend over the water. To achieve this requirement the leaves must be capable of raising to an angle of 82 degrees above horizontal.

As constructed, however, the bridge is incapable of elevating to an 82 degree angle and, since its completion, the State concedes that the leaves have only been elevated to an angle of approximately 65 degrees" (Op. 98a-99a).

These findings are fully supported by the evidence (80a-82a; Exh. 13, E-4; Exh. 17, E-8).

The District Court then concluded:

"The discrepancy between the approved plans for the bridge which specified that the leaves be elevated

to an angle of 82 degrees and the bridge's actual capability of rising to only 65 degrees violates §9 of the Rivers and Harbors Act (33 U.S.C. §401) which provides:

' . . . it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received approval of the Chief of the Engineers and of the Secretary of the Army.'

It is conceded that the State obtained no authorization modifying the plans" (Op. 106a).

These conclusions are, in all respects, correct.

But at this point the District Court, citing *In Re Great Lakes Towing Company*, 348 F. Supp. 549 (N.D. Ill. 1972), held that the State's clear statutory violation was not a legal cause of the collision with the girder.

In the *Great Lakes* case a ship collided with a bridge that was elevated to 75° instead of 82° as required by the permit. The District Court exonerated the bridge, holding that (1) *The Pennsylvania Rule** did not apply to a bridge collision and (2) the ship had not proven that the lower elevation contributed to the collision (p. 554). On appeal, *Chicago and West. Indiana R. Co. v. Motorship Eiko Maru*, 505 F.2d 579 (7 Cir. 1974), the Court noted that *The Pennsylvania Rule* should have been applied:

* Requiring a party to prove that its statutory violation "could not" have been a cause of the casualty. *The Pennsylvania*, 86 U.S. 125, 136 (1873).

“‘We follow the line of cases which hold that a violation of the provisions of a War Department permit imposes on the bridge owner the burden of showing that the violation could not have contributed to the casualty’” (p. 584).

The Court held, however, that the bridge met its *Pennsylvania* burden because:

“* * * at the time the Ship struck the bridge, it had gone *outside the protected channel*” (emphasis added, p. 585)

and

“The bridge was not encroaching into the channel at any height where it could have been struck by this Ship if the Ship was within the channel” (p. 586).

In Tomlinson, however, the facts are substantially different. The barge, when it hit the girder, was *not* outside the “protected channel”. Watkins, the surveyor, testified that the point of impact on the girder was plumbed 2'6" on the channel side of where the fender line would be if the fender had been in place (58a-59a, 60a-61a). Warm, another surveyor, testified to the same effect (77a). Thus there can be no dispute that when the chock snagged the girder, the barge was within the navigable channel where it had every right to be. Moreover, the Tomlinson leaf *was* “encroaching into the channel”. It protruded 19' over the channel and occupied space that should have been available for the barge. The *Great Lakes* decision, therefore, is not in point and its facts do not support exoneration of the State.

There seems little doubt that *The Pennsylvania* Rule applies to bridges. Many cases are collected in *Complaint of Wasson*, 495 F.2d 571 (7 Cir. 1974), cert. den. 419 U.S. 844 at pp. 579-81. See also *Nassau County Bridge Auth. v. Tug Dorothy McAllister*, 207 F. Supp. 167, 171 (EDNY 1962) aff'd 315 F.2d 631 (2 Cir. 1963). Indeed Judge Lasker held *The Pennsylvania* Rule applicable to the first collision involving the State's failure to properly maintain the fender system (Op. 106a) but, curiously, when discussing the State's participation in the collision with the girder, Judge Lasker cited the passage from the trial Court in *Great Lakes Towing*, *supra*, where that Court declined to apply *The Pennsylvania* Rule to a bridge collision (Op. 108a).

Many decisions have held bridges liable for collision damage when the bridge has deviated from its permit authorization.

In *Petition of McMullen & Pitz Construction Co.*, 230 F. Supp. 726 (E.D. Wis. 1964) a chock 3' above a vessel's main deck, contacted a girder on a bascule bridge in 1960. The plans, approved by the War Department in 1925, illustrated that the bridge was to open to "about 84°3'". However, as constructed, the bridge could open only to "79°3'". Violation of the approved plans was held a statutory fault, triggering application of *The Pennsylvania* Rule, requiring the bridge to show that this fault "could not" have contributed to the casualty. Because the lower elevation permitted the leaf to hang further over the channel, the burden could not be met and the bridge was at fault:

"Therefore, the Court finds that the bridge must be held causally negligent due to its deviation from the approved plans" (p. 731).

The facts in *McMullen* are strikingly similar to Tomlinson. Thus in *McMullen* the Court noted:

“ * * * the contact between the chock plate of the Polaris and the bridge girder involved a matter of inches” (p. 731).

Likewise in Tomlinson only the upper 6" of the chock engaged the girder (39a, 50a). Had the Tomlinson leaf been elevated to 82° the chock could not have snagged the girder because, but for the overhang, there was nothing to snag.

In *United States v. Norfolk-Berkley Bridge Corporation*, 29 F.2d 115 (E.D. Va. 1928) a bridge was constructed and maintained so that its gear racks hung over the channel in violation of the approved plans (p. 123). These gear racks were struck by two vessels on separate occasions (p. 123-4). The tug captain in charge of each operation was aware of the danger from the overhanging gear racks (p. 126-7) and the Court faulted the tug owner for the failure of the tug captains to avoid the overhanging racks as had been “successfully done on many prior occasions” (p. 126). But this, the Court said, did not exonerate the bridge because the bridge, being in violation of its permit, was an “unlawful obstruction” and was “presumptively” at fault (p. 125). The Court rejected the argument that the tug captains had the “last clear chance” to avoid collision and held the bridge jointly at fault because “had there been no overhang, the collision would not have taken place” (p. 126).

In *M & M Dredging and Constr. Co. v. Miami Bridge Co.*, 39 F. Supp. 311 (S.D. Fla. 1941), the War Department permit required “an opening of 60 feet” between the leaves

of a bascule bridge when fully open (p. 312). The bridge operator, however, elevated the leaves so that the width between their tops was less (only 50-57'), and a 30' high spud on a dredge hit the leaf. The bridge owner was held liable for this negligent operation.

In *Norfolk Dredging Co. v. Coppedge*, 1971 AMC 2307 (M.D. Fla. 1970—not otherwise reported), aff'd 438 F.2d 1235 (5 Cir. 1971), the War Department approved plans:

“ * * * required a horizontal clearance of sixty feet between the bascules when open” (p. 2308).

The bridge, however, was raised to provide a lesser clearance, causing 4'5" of the E'ly leaf to overhang the channel, resulting in a spud on a dredge striking this leaf. The bridge was held solely liable for its negligent failure to open to the “sixty feet clear passage” (p. 2310) required by the permit.

In *Wilmington Transp. Co. v. Standard Oil Co.*, 53 F.2d 787 (9 Cir. 1931) the War Department permit required a bascule bridge to elevate to an angle of 82° with the horizontal (p. 787). The leaves, however, were elevated to a lesser angle (probably 76°) and the upper portion of a ship passing through the draw contacted one leaf. The bridge was held solely at fault for failing to elevate as required by its permit (p. 791).

Judge Lasker seemed preoccupied with the fact that the pilot (Captain Calain) was aware that the leaves overhung the channel (Op. 100a, 107a, 108a). There is no dispute that the overhang was visible and known to the pilot.

But this should not exonerate the State.* The protrusion of the leaves 19' over each side made the transit of the draw more difficult. Taking a 290' long x 55' wide barge through a 126' channel, provides only 35½' of clearance on each side—actually less because of the need to keep to the left because of the high king post on the right side of the barge (32a-33a, Exh. 47, E-15). A barge of this size is unwieldy and cannot be depended upon to move in a precise course. It was not child's play to take the BECRAFT through this narrow draw. It was a hard, difficult, demanding job and, by reducing the overhead clearance, the State seriously impeded safe navigation and made the job harder and more dangerous.

By exonerating the State, Judge Lasker adopted the State's argument that the permit violation was a passive act of negligence, a "condition not a cause," of the chock snagging the girder. But this doctrine has no place in today's collision law.

The "condition not a cause" doctrine was developed to alleviate the harsh consequences of the divided damages rule which required that a party guilty of slight fault bear half of the damages in a collision case. To avoid this un-

* The pilot was likewise aware that the fenders were missing leaving the abutment unprotected (as graphically shown in Exh. 12—E-3) but the State was nonetheless held liable for the consequences of this fault. As to his awareness, the pilot testified:

"Q. How long had they [fenders] been in that fashion?
A. Oh, I would say a month or two anyway.

* * *

The Court: How do you know?

The Witness: Because we had traveled through there prior to this.

The Court: And you observed them?

The Witness: Yes, sir. (40a-41a)

This was confirmed by the DIANA's mate (51a).

just result, Courts sometimes held that the slight fault was a "condition not a cause" of the collision, thus exonerating the slight wrong-doer and thereby achieving a rough measure of justice. D. Buckner, *Last Clear Chance Doctrine in Admiralty*, 3 A.L.R. Fed. 203, 211 (1970).*

However, in *United States v. Reliable Transfer Co. Inc.*, 421 U.S. 397 (1975), the Supreme Court gave the death knell to divided damages, adopting the rule of proportionate fault in collision cases so that a Court is now free to adjust the percentage of fault to achieve a fair result. Therefore since there is no longer any reason for its existence, the passive negligence "condition not a cause" doctrine is stripped of whatever vitality it once had.**

* "Strictly applied, the rule of divided damages in cases of mutual fault contributing to the accident (or, in other words, 'both to blame' collision cases) might result in an equal division of the damages although one party or vessel was guilty of only a slight minor fault and the other party was guilty of a much more serious fault.

In such a situation, the admiralty courts have sometimes held the party guilty of the more serious fault solely liable by application of the so-called 'major and minor fault' rule or principle. Although the principle has been expressed in various ways, under the major-minor fault rule the minor fault is excused, disregarded, or held or presumed not to be contributory, and the vessel grossly at fault is held liable for the entire damage.

A somewhat similar result (holding one vessel liable for all the damages) has also been reached in the many cases where the courts have reasoned that although the vessel exonerated was, or may have been, at fault in some respect, such fault was merely a 'condition' and not a 'cause' of the accident, or was not a 'contributory' or 'proximate' or legal cause of the accident."

** The "major-minor" fault doctrine, *The City of New York*, 147 U.S. 72, 85 (1893), which Judge L. Hand described as a "sop to Cerberus" to avoid divided damages, *National Bulk Carriers v. United States*, 183 F.2d 405, 410 (2 Cir. 1950) cert. den. 340 U.S. 865, was recently jettisoned. *Getty Oil Company (Eastern Operations) v. S.S. Ponce de Leon*, 409 F. Supp. 909 (SDNY 1976) at p. 916-7.

Moreover, even before the Supreme Court's adoption of proportionate fault, this Court in *Reliable Transfer Co., Inc. v. United States*, 497 F.2d 1036 (2 Cir. 1974)* refused to apply the "condition not a cause" doctrine where a stranding was caused by the Coast Guard's failure to maintain a light and the ship's negligence in making a U-turn in a dangerous channel knowing the light was out:

"We also reject the government's claim that its failure properly to maintain the breakwater light was merely a *condition rather than a cause* of the stranding. *Surely it was a but-for cause.* The court found, as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel" (p. 1038, emphasis added).

Likewise, the overhang of the Tomlinson Bridge leaf "surely *** was a but-for cause" because, *but for* the overhang, the chock could not have snagged the leaf.

Judge Lasker, after finding that the overhang was a violation of the Rivers and Harbors Act (Op. 106a), in effect *forgave* the statutory fault by applying the passive negligence "condition not cause" doctrine. But this Court (and others) have strongly suggested that it is improper to *forgive* faults to which *The Pennsylvania* Rule applies. Thus in *Diesel Tanker F. A. Verdon, Inc. v. Stakeboat No. 2*, 340 F.2d 465 (2 Cir. 1965) this Court admonished:

" *** where the breach of duty is statutory, it is the *impossibility* that it may have been one of the causes of the collision, not the forgiveability of one which

* Reversed, but only on the divided damages rule, at 421 U.S. 397. 397.

did, that affords relief from liability for that violation. No tour de force can transmute the minor fault among varying degrees of negligence into the non-existence of proximate cause." (p. 468, underlining ours).*

There being no dispute that the overhang was a "but-for-cause," it was clear error to *forgive* the State for its statutory fault.

In *Board of Com'rs. of Pt. of N. Orl. v. M/V Agelos Michael*, 390 F. Supp. 1012 (E.D. La. 1974) a docking vessel struck a crane protruding 13' over the face of the wharf. The pilot had docked "100-150" vessels at this facility and was well aware of the protrusion (p. 1013). The Court, nevertheless, found the dock jointly at fault for the collision, saying:

"In fact, there is no doubt that 'but for' the 13 foot extension of the crane over the water, the accident would not have happened" (p. 1016, emphasis added).

The dock owner's attempt to obtain *forgiveness*, by asserting the doctrine of "last clear chance", was rejected.

* See also:

Tank Barge Hygrade v. The Gatco New Jersey, 250 F.2d 485 (3 Cir. 1957) :

"Moreover where a failure to follow a statutory requirement is alleged as a fault it may be questioned whether the Rule of *The Pennsylvania* * * * would permit it thus to be ignored" (p. 487).

American Producer—M.M. Dant, 1972 A.M.C. 642 (N.D. Cal.—not otherwise reported) :

"The applicability of the *Pennsylvania Rule* creates a heavy burden of proof on the *Producer* which cannot be circumvented by incautious of the major-minor fault rule" (p. 649).

Petition of Kinsman Transit Company, 338 F.2d 708, 720 (2 Cir. 1964), cert. den. 380 U.S. 944.

The free use of the Nation's navigable waters is paramount to the right of any person to obstruct those waters:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount". *Clement v. Metropolitan West Side El. Ry. Co.*, 123 Fed. 271, 273 (7 Cir. 1903).

By constraining the bridge so that its leaves impinged upon the navigable channel, the State violated §9 of the Rivers and Harbors Act (33 USCA 401) and must bear its fair share of the damages from the girder collision.

POINT II

Where the Tomlinson Bridge's fender system was broken and deteriorated, the District Court erred in failing to hold this fault a contributing cause of the collision between the barge and one of the overhanging leaves.

Judge Lasker summarized Moran's argument:

"Calain [pilot] testified that had the fender system been in proper repair, the BECRAFT would have deflected further into the channel before* striking it; that is, the barge would have been positioned more toward the center of the passage, and the chock would

* This word should be "after".

not have struck the bridge girder (49). However, two witnesses employed by MORAN, Watkins and Warm, testified to the contrary (145, 169)." (Op. 100a).

Judge Lasker then found:

"We find that the preponderance of the evidence is that any added deflection of the barge that would have resulted from a proper fender system would not have prevented the collision between the chock and the girder" (Op. 100a-101a).

As the barge was moving through the draw the left side midships struck the unprotected granite abutment and the barge deflected to the right further into the channel (35a-36a, 44a). The DIANA then put her engines full ahead to straighten the barge (49a) but (the Court found—Op. 104a) that this caused the after end of the barge to move to the left. The barge continued ahead and within seconds after the DIANA's engine increase (49a-50a), the upper 6" of the chock snagged the girder (39a, 50a).

Surveyor Watkins measured the fender (where it was in place) and found it 4' wide (59a-60a). Simple mathematics establishes that with a 4' wide fender, the barge would deflect substantially more to the right into the channel hence the after end of the barge would have to move *more* to the left, before the leading edge of the chock could snag the girder.

Judge Lasker found that "If the barge had been only three inches further to the right" (Op. 101a) the chock would have passed safely under the girder. This finding is fully supported by the evidence (85a-86a; Moran Exh. 54, E-19). Therefore because of this exceedingly close

tolerance, it stands to reason that had the barge originally bounced 20", 30" or 40" *more* to the right, the leading edge of the chock would have passed under the girder, avoiding the collision.

Judge Lasker rejected this argument saying:

"However, two witnesses employed by Moran, Watkins and Warm, testified to the contrary" (Op. 100a).

But the testimony of these two witnesses was misunderstood. Watkins said the point of impact on the girder was plumbed 2½' on the channel side of a properly maintained fender line. He then testified:

"Q. So as I understand you, then, you are concluding that had the fender system been in place on May 17, 1972, in its entirety, the chock would still have collided with the underside of the bridge with the side of the barge at least two feet from the outside of the fender system, is that so?"

* * * * *

The Witness: If the fender system had been intact, the barge chock would have still struck the girder.

Q. And that did not require the side of the barge to even be in contact with the fender system, is that so? A. That's correct" (61a).

Watkins, therefore, said only that the chock would touch the girder *before* the side of the barge touched a proper fender line. Watkins was *not* asked whether a properly

repaired fender would deflect the barge further into the channel, necessitating a greater movement to the left for the chock to engage the girder. His testimony, therefore, was misunderstood by the Court and in no way contradicts the testimony of the pilot that with a properly maintained fender, providing more deflection, the chock would have cleared (41a-42a).

Warm's testimony was similar. Counsel, reading from Warm's report, asked these questions:

"Q. 'It was noted that the north and center section—of the timber fender system were broken out and in places missing. Because of the limited clearance of the span, these fenders lie just outside the face of the bridge and provide only a fender surface between a vessel and the bridge. It appears that the contact with the bridge span may have occurred regardless because of the very high freeboard of the barge. This will be confirmed.'

Is that your statement? A. That is correct, in the report.

Q. So was it your opinion that the chock would have contacted the span regardless of the condition of the fender? A. At that time it was" (77a).

There is no suggestion that Warm was asked about the deflection of the barge had it struck a properly maintained fender instead of a granite abutment. Warm's testimony was, we suggest, also misunderstood by the Court.

The record, therefore, is devoid of any evidence contradicting the pilot's testimony that, with a proper fender system, the added deflection of the barge would result in the chock clearing the girder.

The pilot's testimony should be credited, not only because it is undisputed, but also because it is supported by uncontested physical facts. The importance of physical facts has long been recognized as an aid to determining the reliability of testimony. In *The Texas*, 226 Fed. 897 (3 Cir. 1915) the Court said:

"In this class of cases the proof of physical facts (for example, the position of a sunken vessel) sometimes enables a court to pronounce with certainty at what point on the water the collision took place; * * * So, too, the injured condition of the vessels is sometimes of great value in determining the force and direction of the blow;" (p. 904).

This Court has held that evidence conflicting with established facts must be rejected. Thus in *The Manchioneal*, 243 Fed. 801 (2 Cir. 1917) this Court rejected a steamer's version saying "The story of collision is physically impossible" (p. 804). So also in *The Coamo*, 280 Fed. 282 (2 Cir. 1922) this Court rejected evidence in conflict with a vessel's established turning radius saying "The trouble with this statement is that it cannot possibly be true" (p. 285). *Conversely*, evidence supported by physical facts should be given the greatest weight.

Thus, the established fact that a 48" wide fender would have deflected the barge further to the right coupled with the finding that "If the barge had been *only three inches* further to the right" the chock would have cleared (Op. 101a), proves, we submit, that the fender violation *was* a contributing cause of the girder collision. The contrary finding was "clearly erroneous".

Moran, however, did not below, nor does it here, have the burden of proving causation. Judge Lasker correctly held that the missing fender was a statutory fault making *The Pennsylvania Rule* applicable (Op. 106a). The State has not and cannot show that its violation "could not" have caused the chock to snag the girder.

In *Complaint of Wasson*, 495 F.2d 571 (7 Cir. 1974), cert. den. 419 U.S. 844, the Court recognized that fenders are:

"* * * both for the protection of the bridge and for the protection of waterborne commerce" (p. 578).

Warm, a surveyor of long experience, testified that fender systems are "to keep the vessel clear of the bridge structure" (74a) and Beaudin, who spent a professional lifetime with the Army Engineers (78a-80a), testified that fenders are:

"To protect the bridge structure, the pier, the abutment and navigation" (86a).

By failing to properly maintain the fenders the State failed to protect the *bridge structure*, thus exposing the leaves to unreasonable risk of collision and the State must bear responsibility for the collision with the leaf that was proximately caused by this lack of care and breach of statutory duty.

It is beyond dispute that a bridge owner is liable for its own damages from the failure to maintain proper fenders, *Complaint of Wasson, supra*, as well as for damage to others: *City of Milwaukee v. Kensington S.S. Co.*, 199 Fed. 109 (7 Cir. 1912); *Reichert v. Long Island R. Co.*, 194 Fed. 407 (2 Cir. 1912).

Divided Damages

Since the State's faults proximately caused the chock to snag the girder, the consequent damages must be apportioned between the State and Moran under the doctrine of *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975).

Because the damage from the first collision (resulting from Moran's fault and the State's statutory breach and negligence) was "apportioned equally" (Op. 106a), it is equitable that the damage from the second collision (resulting from Moran's negligence and the State's negligence and statutory breach) be "apportioned equally" also.

POINT III

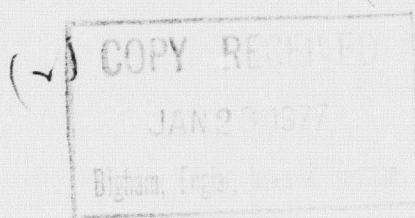
The judgment of the District Court should be reversed in part to hold the State of Connecticut liable for half damages resulting from the chock striking the girder.

Dated: New York, New York
January 28, 1977

Respectfully submitted,

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